



Bob Ferguson

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*Via Electronic and United State Mail*

December 4, 2015

Steven V. King, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
1300 S Evergreen Park Dr. SW  
P.O. Box 47250  
Olympia, Washington 98504-7250

RE: *BNSF Railway Co. v. Whatcom County*  
Docket TR-150189

Dear Mr. King:

Enclosed for filing in the above-referenced dockets are the original and two copies of Commission Staff's Response to Bench Request No. 4, and Certificate of Service.

Sincerely,

JULIAN BEATTIE  
Assistant Attorney General

JB/emd  
Enclosures  
cc: Parties w/enc.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION STAFF  
RESPONSE TO BENCH REQUEST

DATE PREPARED: December 4, 2015  
DOCKET: TR-150189  
REQUESTER: Bench

WITNESS: Julian Beattie, AAG  
RESPONDER: Julian Beattie, AAG  
TELEPHONE: 360-664-1225

**BENCH REQUEST NO. 4:**

At the Commission's evidentiary hearing on December 1, 2015, ALJ Rayne Pearson asked Commission Staff, "Has the Commission ever challenged a SEPA Determination of Nonsignificance?"

**RESPONSE:**

Staff is unaware of any docket in which the Commission, or any ALJ employed by the Commission, while presiding over an adjudicative proceeding, has formally challenged a SEPA Determination of Nonsignificance (DNS) issued by another agency.

In the relatively recent Hickox Road crossing closure docket, one of the parties asked the Commission to "seek supplemental review [of a SEPA DNS issued by WSDOT] in order to make a new threshold determination so that adequate review of the potential environmental impacts to Petitioners' proposal occurs." *BNSF Railway Company v. City of Mount Vernon*, Docket TR-070696, Mount Vernon's Pre-hearing Motion in Limine and Motion for Summary Judgment Requiring New SEPA Determination by the WUTC at 13 (Aug. 28, 2007). The Commission denied the request as moot (WSDOT had agreed in the interim to issue a new determination) but also noted the absence of any proffered authority permitting a presiding officer in an adjudicative proceeding to review another agency's SEPA determination:

Even if WSDOT had not agreed to issue a new SEPA determination, the City's Motion for Summary Judgment failed to articulate any jurisdictional basis for the presiding officer or for the Commissioners themselves to act in an appellate authority of another agency's SEPA determinations. Therefore, even if not made moot by WSDOT's subsequent actions, the City's Motion for Summary Judgment and the relief sought could not have been granted.

*Id.*, Order 03 Denying BNSF Motion to Limit Issues and Denying City of Mount Vernon Motions for Summary Judgment and In Limine ¶ 19 (Oct. 2, 2007).

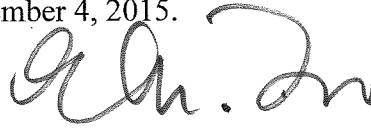
Staff counsel is unaware of any legal authority that would allow Judge Pearson to issue a new or modified SEPA determination within the confines of the present adjudication. As a general rule, an agency acting on a proposal covered by an existing DNS must use that document "unchanged." WAC 197-11-600(3).

Should the Commission require additional briefing, please contact Staff counsel.

Dockets TR-150189  
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached Staff's Response to Bench Request No. 4 upon the persons and entities listed below by depositing a copy of said document in the United States mail, addressed as shown on the Service List, with first class postage prepaid.

DATED at Olympia, Washington, December 4, 2015.



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ELIZABETH M. DeMARCO

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